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IN THE

Supreme Court of the United States

October Term, 1954.

No. [redacted] 93

RENE BUSSOZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Rene Bussoz, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit, rendered by three judges of that Court January 15, 1955, which reversed a judgment of the United States District Court for the Southern District of California, admitting the petitioner, Rene Bussoz, to citizenship.

Opinions Below.

The opinion of the District Court is unreported but is printed in the record [R. 8].

The opinion of the Court of Appeals for the Ninth Circuit appears in the record [R. 132] but at the time of preparing this petition had not yet appeared in the West Publishing Company's Federal Reporter, Second Series.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. Section 1254.

The opinion of the Court of Appeals for the Ninth Circuit was filed January 15, 1955, as was the judgment of that Court. Thereafter on February 9, 1955, an order was made by that Court extending the time within which to file petitioner's petition for rehearing and thereafter within the time allowed a petition for rehearing in that Court was filed on February 26, 1955, and on March 9, 1955, the said United States Court of Appeals for Ninth Circuit made and entered its order denying the said petition for rehearing. An order was made by that Court staying the mandate until May 10, 1955, pending the filing of a petition for certiorari, and a subsequent order was made staying the mandate until May 20, 1955.

Your petitioner asserts that the Court of Appeals did *not* have jurisdiction to consider the appeal below because the final judgment in the District Court was made on November 12, 1952, and the notice of appeal was filed on February 10, 1953.

Questions Presented.

The questions presented by this petition are:

1. Whether a highly desirable applicant for citizenship must be denied citizenship because the Director of Selective Service arbitrarily and wrongly classified him as a "citizen of a neutral country" under the provisions of Section 3a of the Selective Service and Training Act of 1940 when in fact his native country, France, was a "cobelligerent" under that section and the appropriate Selective Service regulation, and as a result of this arbitrary and capricious classification the applicant was required to sign a Selective Service form 301 in order to obtain the protection for his family in occupied France to which, as a cobelligerent, he was entitled without signing the form 301.

2. Whether the Director of Selective Service is free to ignore his own Regulations.

3. Whether, in a naturalization proceeding in which the correctness of the Director of Selective Service's action is at issue, the District Court may inquire into the question of whether the Director of Selective Service has acted contrary to his own Regulations, or whether the District Court is bound to accept every action of the Director of Selective Service without question, and without regard to the Statute and the Regulations.

4. Whether the District Court has or has not the power to determine a question of fact which is at issue before it (in this case the question of France's status as either neutral or cobelligerent) when the Director of Selective Service has made a determination on the subject, even though that determination is contrary to the

Director of Selective Service's own regulations and contrary to the facts.

5. Whether the "Judgment" dated November 12, 1952, in which it was "Ordered, Adjudged and Decreed that petitioner be naturalized . . ." and in which he was ordered back at a later date to take the oath to be administered by the Clerk, is the appealable order in a naturalization proceeding or whether the later "Order" dated December 12, 1952, in which it was "Ordered that he be, and hereby is, admitted to become a citizen of the United States," is the order from which the appeal should have been taken.

6. Whether the failure of the Circuit Court to read the record of this case before deciding the case and whether the Circuit Court's refusal to grant a rehearing after its obvious failure to read the record was pointed out to the Court in a petition for rehearing were such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

7. Whether the indulging by the Circuit Court in a presumption of error on the part of the District Court not supported by the record, and the indulging by the Circuit Court in inferences against the appellee and its failure to induge in inferences against the appellant, particularly where the record on appeal was a partial one at the election of the appellant, are not such a departure from accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Statutes and Regulations Involved.

Section 3(a). Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. Provided, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act, if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. (Sec. 3(a), Selective Service Training Act of 1940, 54 Stat. 893 (50 U. S. C. App. 303).)

28 U. S. C. A. 1291:

"Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

F. R. C. P. Rule 73:

"Appeal to a Court of Appeals.

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided

by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry . . ."

Section 601.1 *Definitions to govern.* The definitions contained in this part shall govern in the interpretation of the Selective Service Regulations.

Section 601.2. *Aliens.* (a) The term "alien" means any person who is not a national of the United States.

(b) The term "national of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(c) The term "citizen or subject of a neutral country" is used to designate any alien except (1) a citizen of a cobelligerent country or (2) an alien enemy.

(d) The term "cobelligerent country" means any country at war with a country against which the United States has declared war.

(e) The term "alien enemy" means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States. (6 Federal Register 6825; 32 C. F. R. 1941 Supp. 2796.)

Statement of the Case.

This case arose in the United States District Court for the Southern District of California as a petition for naturalization by the petitioner, Rene Bussoz, under the provisions of Title 8, U. S. C., Section 701, on the motion of the United States of America for an order denying the petition for naturalization.

This objection by the United States government was based, insofar as we are concerned in this petition, on the grounds that the petitioner had filed with his draft board on April 5, 1943, Selective Service Form 301, entitled Application by Alien for Relief from Military Service. This application is, by its terms, only applicable to a citizen of a neutral country [R. 107]. Prior to signing Selective Service Form 301, the petitioner had made extended efforts to convince the Selective organization that France, the country of which he was then a subject, was not a neutral country and that therefore the Form 301 was not applicable to him [R. 32, 34, 46]. The whole question of filling out Selective Service Form 301 arose on the insistence of the chairman of the petitioner's draft board as a result of the answer which petitioner desired to make to Question No. 41 in Selective Service Form 304, "Alien's Personal History and Statement." The applicable portion of Form 304 is quoted here.

"Section XI. Statement of Alien.

"41. I ..... object to service in the land
(do, do not)
or naval forces of the United States.

"You are informed that if you are an enemy alien or a subject of a country allied with the enemy, you will not ordinarily be acceptable for service in the land or naval forces of the United States if you indicate in item 41 above that you object to such service. If you are a citizen or subject of any other country, you may indicate in item 41 whether you do or do not object to service in the land or naval forces of the United States but such objection may be disregarded. If you are a citizen or subject of a neutral country, and do not wish to serve in the land or naval

> forces of the United States, you may apply to your local board for Application by Alien or Relief from Military Service (Form 301) which, when executed by you and filed with the local board will relieve you from the obligation to serve in the land or naval forces of the United States, but will also debar you from thereafter becoming a citizen of the United States." [R. 113.]

At the time that the petitioner was being required to answer this question as to his possible objection to serving in the land or naval forces of the United States, petitioner had three members of his immediate family residing in France in that portion which was occupied by the Germans [R. 113]. He feared that the Germans would take reprisal against his family if they heard that he had even indicated his willingness to serve in the armed forces of the United States [R. 32, 119]. He also doubted his own safety under the laws of war and Germany's then reprisal tactics if he were taken prisoner. He therefore desired to complete Question 41 by having it state, "I *do* object to service in the land or naval forces of the United States" [R. 46]. Since France was then, in his opinion, a cobelligerent rather than a neutral, under the instructions carried under Question No. 41, he could assume that his objection might well be disregarded, but at least he would not have taken an affirmative step to endanger his family by indicating a willingness to serve. But his draft board chairman was adamant and insisted that if petitioner completed Question No. 41 in that form he would have to file Form 301, "Application by Alien for Relief from Military Service." Form 301 was by its printed terms only applicable to aliens who are citizens of neutral countries. Petitioner insisted that France was not a neutral.

France had been at war with Germany since September 3, 1939, and with Italy since June 11, 1940. There had been no treaty of peace with either of these countries and the then effective regulations respecting the definition of what a neutral country was read as follows:

> "The term 'citizen or subject of a neutral country' is used to designate any alien except (1) a citizen of a cobelligerent country, or (2) an alien enemy.
>
> "(d) The term 'cobelligerent country' means any country at war with a country against which the United States has declared war." (32 C. F. R., Sec. 601.2.)*

The United States had declared war on Germany in December of 1941 and therefore clearly France was, as of that date, a country "at war with a country against which the United States has declared war." It is true there was an armistice in effect on April 5, 1943, between Germany and France and Italy and France but there had been no treaty of peace. As a matter of fact, under the authority of the state of war still existing, shortly after petitioner filed the Form 301, Germany marched into the unoccupied areas of France and later, under the same state of war, and without any further declaration of war,

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*32 C. F. R. Sec. 601.2 quoted in full before under "Statutes and Regulations Involved" is the *only* Regulation on the subject of what is a "citizen or subject of a neutral country." It is true that the Director of Selective Service issued certain "Local Board Releases" and "Local Board Memoranda" which listed countries by the classifications "enemy", "cobelligerent", and "neutral" but these do not purport to be nor are they Regulations. *United States ex rel. Lawrence v. Commanding Officer McCook Army Airforce Base,* (D. C. Neb. 1945), 58 Fed. Supp. 933. Exhibits D and E are examples of this. When these lists put France under the classification of "neutral" they are simply contrary to the Regulations and constitute an invalid classification.

French troops landed on French soil, assisted in the pursuit of the German army back to Germany, occupied German soil and continued to occupy it up through the time of the hearings of this case in the District Court and Circuit Court.

When the petitioner was unable to convince his draft board that France was not a neutral, he asked to be advised as to how best to protect his rights. He was sent by the draft board to one of its official advisers, Samuel J. Crawford, whose testimony appears in the record at page 28 and following. Petitioner explained his problems and his belief that France was not a neutral to Mr. Crawford who, believing fully in the petitioner's sincerity, and in an effort to preserve the petitioner's right to future citizenship, prepared for him and completely worded for the petitioner an affidavit [Ex. C, R. 117] which was the draft board adviser's attempt to preserve the petitioner's rights for him. On the advice of Mr. Crawford, the petitioner executed both the Form 301 and the affidavit, which petitioner sent in together with the Form 304 and noted on the Form 304 at Question No. 41 the existence of the attached affidavit [R. 113]. Immediately upon France being occupied by the allied forces and the DeGaullist government being set up, the petitioner went back to Mr. Crawford to seek his advice as to what he should do to show his willingness to serve and, on Crawford's advice, immediately wrote the following letter:

"Local Board No. 15, November 6, 1944
New York County,
570 Lexington Avenue,
New York 22, New York.

Re: Rene Bussoz—Order No. 1245-A.

Gentlemen:

"Under date of April 8, 1944, I was classified as 4-CH and again on October 26, 1944, I was reclassified as 4-A.

"If you will refer to my reasons for requesting the 4-CH classification which were contained in affidavits sent to you at the time of signing my questionnaire, you will find the reasons therein set forth which prompted me at that time to decline to serve in the military forces of the United States (I being a citizen of France).

"In the last week the situation has changed in France to the point where the reasons I gave for my deferment and classification do not now exist and I would like very much now to have myself classified as being willing to serve in the armed forces of the United States and to be placed in whatever classification the Board cares to place me.

"It would seem convenient that you should transfer this application to the Santa Monica Board No. 243 in whose jurisdiction I now live and have lived for the past three years for whatever further action they wish to take in reference to my reclassification.

"I trust you will give the matter your immediate attention and will advise me if there is anything further I must do other than the request made in this letter.

Yours very truly,
/s/ Rene Bussoz,
12209 Dunoon Lane,
Los Angeles, California."

Over half of the United States casualties in World War II occurred after the date of this letter.

After a full hearing on the issue presented by the government's motion to deny the petition, the District Court agreed with the petitioner that France was not a neutral country within the meaning of the applicable Selective Service Regulations and Statute, and therefore that the execution of the Form 301 was a nullity and the provisions of Section 3(a) of the Selective Service and Training Act had no application to the defendant. Only a portion of these proceedings are in the record since, under the provisions of Rule 17 of the Rules on the United States Court of Appeals for the Ninth Circuit, the appellant elected to go up on a partial record. Thereupon, on the 10th day of November, 1952, the District Court made and entered its "Judgment" in part as follows:

> "It Is Hereby Ordered, Adjudged and Decreed that petitioner be naturalized as a citizen of the United States under the provisions of The Nationality Act of 1940.
>
> "It Is Further Ordered, Adjudged and Decreed that petitioner appear before this Court on the 12th day of December, 1952, and take the oath of citizenship to administered by the Clerk of this Court." [R. 22.]

Thereafter, on the 12th day of December, 1952, the Court entered its Order in part as follows:

> "It is hereby ordered that he be, and hereby is, admitted to become a citizen of the United States of America." [R. 23.]

Thereafter, on the 10th day of February, 1953, less than 60 days from the date of the Court's "Order" but more than 60 days from the date of the Court's "Judgment," the government filed its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit [R. 24]. Upon appeal of the District Court's granting of the petitioner's application for citizenship, the Court of Appeals, three judges sitting, reversed the order of the District Court, holding that the determination by the Director of Selective Service that France was a neutral was final and binding and could not be inquired into by the District Court and that therefore the execution of Form 301 forever debarred the petitioner from United States sitizenship. The Court of Appeals stated that the District Court "had no power to make its own determination in this case, of France's status."

Petitioner filed a petition for rehearing in the Court of Appeals, directing the Court's attention to substantial errors in the Court of Appeals' opinion, at least one of which clearly indicated that the Court had *not read the record* on appeal, but the Court of Appeals denied a rehearing of the case.

Reasons Relied on for Granting the Writ.

1. The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

(a) This Court should decide the question of whether or not the District Court, in a case of this kind, has the power to make a determination of the status of the petitioner's country. The Court of Appeals' opinion [R. 137] reads as follows:

> "The District Court had no power to make its own determination in this case, of France's status[8] . . .
>
> "[8]Some District Courts have made determinations of the status of neutral countries in cases involving Sec. 3a. See, *e.g.* Petition for Ajlouny, 77 Fed. Supp. 327 (where the Director's Regulation as to Palestine was held to be misapplied) and other cases mentioned in *In re* Molo, *supra*. Be that as it may, we hold that the District Court had no such power in this case."

In holding as it did, the Court of Appeals has clearly ruled contrary to the principles laid down in *McGrath v. Kristensen*, 340 U. S. 162, 71 S. Ct. 224, 95 L. Ed. 173, as will be set forth below, but on the narrow question of whether or not the District Court can re-examine the classification of a country by the Director of Selective Service as being a neutral, this Court has not up to now spoken. All previous decisions on the subject have been by District Courts.

> *Petition of Ajlouny* (E. D. Mich., S. D., Judge Levin, 1948), 77 Fed. Supp. 327;
>
> *Petition of Dweck* (E. D. N. Y., Judge Kennedy, 1950), 106 Fed. Supp. 169;

In re Molo (S. D. N. Y., Judge Goddard, 1950), 107 Fed. Supp. 137;

Matter of Pinchot (S. D. N. Y., Judge Irving Kaufman), not reported, but referred to in *In re Molo, supra.*

In no case did any one of these courts question the right of the District Court to decide this question as it would any other question of fact presented to it. In most cases, but not always, they have supported the Director's findings. They have always undertaken to decide the question.

McGrath v. Kristensen, supra, clearly holds that the mere execution of Form 301, in itself, does not bring a person within the provisions of Section 3a of the Act. That case holds that he must be a person who fits the description of Section 3a of the Act. In *McGrath v. Kristensen,* Section 3a was held to be not applicable because the alien was not at that time a "resident" within the meaning of Section 3a, *as defined by the Regulations.* In the present case, the District Court had the responsibility of determining the question of whether or not the petitioner was a "citizen or subject of a neutral country" within the meaning of Section 3a of the Act and the applicable Regulations. This decision had to be made by the District Court before it could decide if Section 3a of the Act had any application at all. It is of interest to note that in taking this position the Court of Appeals does not even purport to give any reason to support its position.

(b) The Court of Appeals has decided *sub silentio* that a Judgment of the District Court, made under the hand of the District Court judge at the conclusion of the final hearing, which ordered "that petitioner be naturalized as a citizen of the United States under the provisions of

the Nationality Act of 1940," and left nothing further to be done in the matter except the taking of the oath of citizenship to be administered by the Clerk of the Court, was *not* a final decision within the meaning of Title 28, U. S. C., Section 1291.

This Court has never decided the question of what is a final decision in a naturalization proceeding. It has, however, many times laid down the general test of what such a final decision is, the general rule being that *a final judgment or decree is one that terminates the litigation on the merits, so that in a case of affirmance the trial court will have nothing to do but to execute the judgment or decree it originally rendered, that is, leaving nothing except ministerial acts to be performed by the trial court.* (*Catlin v. United States* (1945), 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911; *Weston v. Charlston,* 2 Pet. 449, 7 L. Ed. 481; *Park v. Kansas City* (1889), 172 U. S. 334, 19 S. Ct. 207, 43 L. Ed. 467.) By this test, clearly the judgment made on November 10, 1952, and entered on November 12, 1952, was the final decision in the case. There remained nothing to be done except the taking of the oath by the petitioner before the Clerk. All of the issues between the parties had been finally decided by the making of that order. There remained nothing further to be done of a judicial nature in the case. The Court of Appeals ignored this question in its decision, and proceeded to take the merely ministerial Order of December 12 as the final decision in the case.

The practice of administering the oath at a date subsequent to the final hearing is widespread, at least in the District Courts of the Ninth Circuit, and a determination of what is the final decision in such a case is of great importance to the administration of the Nationality Act.

2. The Court of Appeals Has Decided Two Federal Questions in a Way in Conflict With Applicable Decisions of This Court.

(a) The holding in Court of Appeals' Opinion that the "District Court had no power to make its own determination" of the status of an alien registrant under Selective Service Regulations is clearly in conflict with the principle of *McGrath v. Kristensen,* 340 U. S. 162, 71 S. Ct. 224, 75 L. Ed. 173.

The question presented to the District Court in this case was whether petitioner was, in the language of the statute, a "citizen or subject of a neutral country" who "prior to his induction into the land or naval forces . . . [had] made application to be relieved from . . ." liability for training and service. If petitioner was such a person he would be ineligible for citizenship. If he was not the statute had no application to him and he was eligible for citizenship.

In other words, the District Court had as its first responsibility the determination of whether or not he was a "citizen or subject of a neutral country." But the Court of Appeals said:

> "This case is governed by the Selective Service Act. The decision of the Executive, whom Congress expressly authorized to carry it out, are therefore not subject to judicial review, except in the rare event of arbitrary or capricious acts . . .
>
> "The District Court had no power, to make its own determination in this case, of France's status." [R. 136.]

Clearly this is in conflict with the holding of the Supreme Court in *McGrath v. Kristensen, supra,* where this

Court held that the District Court was wrong in refusing to reexamine the action of the Director of Selective Service in classifying Kristensen as a "resident" within the meaning of Section 3a of the Act and the regulations. As this Court said:

> "The question, then, is whether Kristensen was 'residing' within the meaning of the Selective Training and Service Act of 1940 and regulations issued thereunder, at the time of his application, March 30, 1942. As we conclude that he was not a resident under the Act at the time of his application for relief from military service, we do not decide whether Denmark was a neutral country[1] . . .
>
> "The phrase of §3(a), 'every other male person residing in the United States,' when used as it is, in juxtaposition with 'every male citizen,' falls short of saying that every person in the United States is subject to military service. But the Act did not define who was a 'male person residing in the United States,' liable for training and service after December 20, 1941, 55 Stat. 845. Such precisiveness was left for administrative regulation. Section 10(a) and (b), 54 Stat. 893, 894, authorized the President to prescribe rules and regulations for the Act with power of delegation. The President prescribed the first regulations on September 23, 1940, and authorized the Director to prescribe amendments. Exec. Order 8545, 3 CFR, 1943 Cum. Supp., 719, 722. Amendments promulgating the regulations here applicable were issued, effective February 7, 1942, 7 Fed. Reg.

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[1]It is this second class of question, *i.e.*, Denmark's status, which the Circuit Court rules the District Court lacked the power to decide, even in the face of this dictum indicating its susceptibility to judicial determination.

855. They are set out below. Under these regulations it would seem that Kristensen, who never declared an intention to become a citizen of the United States and who entered the United States in August, 1939, was not classified as a resident neutral alien until May 16, 1942 . . ."

Clearly this Court has ruled that the question of the applicability of Section 3a is a judicial one and not one left up to the Director of Selective Service exclusively. The reservation as to Denmark's neutrality clearly implies that such a factual determination is one that is proper for the court in a proper case.

The decision by the Court of Appeals is a clear holding to the contrary. Its importance is great in this immediate type of case and for that reason alone certiorari should be granted rather than let this holding stand. It is, however, more general in its application since it holds in effect that the actions of the Director of Selective Service are not subject to judicial review *even when the Director of Selective Service has ignored his own regulations.*

The Local Board Release and Local Board Memorandum [Exs. D and E] are by their terms merely advisory to the local boards and are *not* regulations. They are not published in the Code of Federal Regulations and do not purport to be regulations. In so far as they are inconsistent with regulations they are invalid. (*United States ex rel. Lawrence v. Commanding Officer of McCook Army Air Force Base* (D. C. Neb., 1945), 58 Fed. Supp. 933.)

Their very limited scope is made clear in their texts where the Director says:

> "*To assist local board in determining* whether or not an alien registrant is a citizen a subject of a neutral country, there is attached . . ." etc.

The Director makes the regulations; the local board is bound to act pursuant to the regulation. And the District Court has the power and the duty to determine whether that local board acted in accordance with those regulations.

(b) In presuming that the District Court had ignored Exhibits D to K in making its determination, the Court of Appeals has decided an important question of federal law in a way clearly and radically in conflict with applicable decisions of the Supreme Court.

The cases are legion in this Court, as in every court known to counsel, that error on the part of the trial court is *not to be presumed but must be affirmatively shown.*

> *Bechtel v. United States* (1897), 101 U. S. 597, 25 L. Ed. 1019.

Further doubts are to be resolved in favor of a judgment rather than against it.

> *Merryman v. Bourne,* 76 U. S. 592, 19 L. Ed. 683.

Exhibits D to K are not printed in the printed record but, at the request of the respondent, by stipulation [R. 128] were transmitted to the Court of Appeals in their original form. Copies of those exhibits are before the Supreme Court and they disclose that they were accepted

by the District Court on October 23, 1952, for identification. This was after the time set for their presentation and after the District Court had indicated how he would rule. Nevertheless, 18 days later, on November 10, 1952, in open court with counsel for both sides present, the District Court admitted them into evidence and *after admitting them* made his final ruling.

In spite of this fact, the Court of Appeals had this to say:

> "For some unclear reason, the District Court failed to take into account appellant's exhibits admitted on November 10, 1952. Had it done so, it would not have fallen into the error of incorrectly resting decision upon the predicate announced in its memorandum decision of September 29th. For respondent's (appellant here) exhibits D and E, admitted on November 10, 1952, show beyond any question whatever that not only did the Director of Selective Service determine that France was a neutral at the time in question, but also that he did so upon the *written official approval* and advice of the Secretary of State. Under these circumstances, there was no proper basis for the Court's affirmance, on November 10, 1952, of the views expressed in its memorandum decision of September 29th."

This is a clear departure from the principle that where proof has been taken it must be presumed, in the absence of anything in the record to the contrary, that it was considered by the Court in the disposition.

3. The Court of Appeals Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision.

The opinion of the Court of Appeals discloses that its writer had not read the record when the opinion was written. And when the numerous factual mistakes in the opinion were pointed out to the Court of Appeals in a petition for rehearing, neither was the petition granted nor the errors in the opinion modified.

It is certainly axiomatic that an appellate court should be familiar with the record before it. The decision on appeal is properly a review of a specific record. Occasionally counsel will have doubt as to the degree of the familiarity at the time of oral argument, but no case with which counsel in this case are familiar has so conclusively disclosed ignorance of the record *at the time of writing the opinion.*

If there had been only insubstantial factual errors the proper administration of justice would require that they be corrected but where, as in this case, the factual errors in many instances go to the heart of the questions presented and certainly reveal misunderstanding of fact which could not but affect the Court's attitude, exercise of the Supreme Court's supervisory power is most certainly called for, and loudly called for.

The opinion of the Court of Appeals discloses the following types of errors in reading, or failing to read, the record:

(a) Ignorance as to the state of condition of the Record on Appeal.

(b) Factual errors as to the evidence regarding the Petitioner's conduct.

(c) Misunderstanding as to the record on the nature of the actions of the Director of Selective Service.

(d) Misunderstanding as to the issue presented to the District Court.

(e) Wholly unfounded and erroneous statements as to the conduct and actions of the District Judge.

(a) IGNORANCE AS TO THE STATE OF CONDITION OF THE RECORD ON APPEAL.

At page 2 of the printed Opinion of the Court of Appeals [R. 133] is the statement, "The record before us is somewhat unorthodox" and thereafter is set forth at some length a history of the proceedings below. This account is seemingly given for the purpose of spelling out the background of certain exhibits of the Respondent Government, Exhibits D to K. And the account ends with this remarkable statement:

> "We learn these facts because the documents admitted as exhibits by the Court in its minute order of November 10th, not having been included in the printed record on appeal, were sent up to this court and were before us at the time of the argument and submission of the cause. *It has not been explained why these important documents were omitted from the printed record.*" (Emphasis added.)

At pages 128 and 129 of the printed record appears an Order of the Court of Appeals which is based upon a Stipulation by both parties. That order is as follows:

> "It Is Ordered that Exhibits 1 to 7 and A to K inclusive of the parties hereto now of record in this Court *need not be printed, and the same may be con-*

sidered by this Court as part of the record on appeal in the above-entitled matter *in their original form.*" (Emphasis added.)

A mere oversight, you say? "After all, the Circuit Court did see the exhibits and that is the important thing." This perhaps could be said if it were the only misreading of the record that is disclosed in the opinion. Even so, it places on counsel, who is bound by his oath to "maintain the respect due to courts of justice and judicial officers," a heavy burden in explaining to his client how a court which seemingly has not read the record before it has nevertheless accorded his client a full hearing. Without more it would argue that if the Court of Appeals is not only to do justice but to appear to do justice a rehearing should have been had at which the record was being considered in full and counsel could present his case to judges who understood the record.

When this error is taken in conjunction with the other more substantive oversights listed below, it cries out for the exercise of the supervisory power of the Supreme Court if the appearance or the substance of justice is to be had.

(b) Factual Errors as to the Evidence Regarding the Petitioner's Conduct.

Also at page 2 of this Court's Opinion appear the statements:

(1) That petitioner-appellee "claimed (France) to be 'neutral in the present war,' " and

(2) "There is no question that appellee fully understood that in making the application he would, pursuant to Section 3(a), be forever debarred from

becoming a citizen of the United States because he specifically so stated in his written application to the local board." [R. 133.]

The first of these statements (that Bussoz claimed that France was neutral) is in direct contradiction to the testimony not only of petitioner-appellee [R. 45-47], but of the Selective Service official with whom he dealt [R. 31-32]. There is no evidence of any kind upon which to base the assumption that he ever "claimed" that France was neutral. There is substantial unimpeached testimony to the fact that he continuously maintained that France was *not* neutral. The statement in the Court of Appeals' Opinion takes the language of a *printed form* which was prepared by respondent government and puts it into the mouth of the petitioner because the respondent's agents refused to consider his true claim and arbitrarily compelled him to sign Form 301 if he was to answer Question 41 truthfully.

The second statement (that he "fully understood that in making the application he would . . . be forever debarred from becoming a citizen . . .") once again plucks out of context language from a printed form and ignores the written and oral evidence of what his understanding was at that time.

It completely ignores the following language in the statement prepared for him by the Selective Service adviser *for the purpose of preserving his right to become a citizen:* "but under the circumstances hereinafter related it is hoped that some solution can be worked out that will help the undersigned; . . ." [R. 119]. It completely ignores the testimony of Samuel J. Crawford, the Selective Service adviser [R. 32]. And it ignores the testimony of petitioner-appellee [R. 45-47].

It is true that under the principles laid down in *McGrath v. Kristensen, supra,* the crucial question is probably not what the petitioner claimed France's status was but what, under the Regulations, it was in fact. Nevertheless, the mention of it in the Court's Opinion cannot help but lead one to believe that the Court of Appeals was strongly influenced by a misunderstanding of the Record.

(c) MISUNDERSTANDING AS TO THE RECORD ON THE NATURE OF THE ACTIONS OF THE DIRECTOR OF SELECTIVE SERVICE.

The Court of Appeals at page 2 of its Opinion quotes in part a portion of the applicable regulation and then in the footnote sets forth *that part* in full. *It does not* quote that portion of the regulation which applies to France. That is to say it quotes Title 32, Code of Federal Regulations (Cum. Supp.), Section 601.2(c):[2]

> "(c) The term 'citizen or subject of a neutral country' is used to designate an alien except (1) a citizen of a cobelligerent country or (2) an alien enemy";

but fails to quote Section 601.2(d):

> "(d) The term 'cobelligerent country' means any country at war with a country against which the United States has declared war."

Clearly Section 601.2(c) cannot be understood without the definition of cobelligerent in Section 601.2(d) and it is this definition which describes France. Section 601.2 (c), (d) and (e) are the *only Regulations* which tell us what are the "neutral," "cobelligerent" or "enemy alien"

---

[2]Cited as Sec. 601.1 (*sic*) in the Opinion.

countries. The Director of Selective Service, it is true, could have made other Regulations. It is conceivable that he could have simply listed France as a neutral in a Regulation.[3] He did not do this. The Opinion [R. 136] speaks of the lists distributed to the local boards [*e.g.*, Exs. D and E] as if they were exercises of the Director of Selective Service's regulatory powers. *They are clearly not so.* They do not purport to be Regulations and insofar as they list France as a neutral country they are contrary to the Regulations. As such they are void and the refusal of the Selective Service Board to consider any information on the subject [R. 46] was an arbitrary and capricious act and beyond the jurisdiction of the board.

(d) Misunderstanding as to the Issue Presented to the District Court.

At page 5 of the Opinion the court says:

> "No contention has been made that the Director acted arbitrarily or capriciously."

The petitioner-appellee Rene Bussoz testified as follows:

> "Of course I tried to explain that France was not a neutral country and that I had good reasons to think it was not a neutral country, but this particular chairman of the board in my case said France was a Neutral *and did not want to listen to any reasons* and said 'You are a neutral. Sign Form 301.' And I had no choice left, but I hoped that some day the nature of the status of France would come to light

---

[3]Could the Director of Selective Service have listed Great Britain as a neutral? The question is not here in this case so we pass it.

> and this thing would be re-opened and I would get my citizenship anyway." [R. 46.] (Emphasis added.)

At page 75 of the record is a categorical statement by the then counsel for petitioner that the Director of Selective Service did not have the right to determine that France was a neutral. Which in light of the Regulations is clearly so. And again at pages 60 and 61 of the record is a clear statement that the conduct of the Director "was unwarranted under the law" and that the execution of the Form 301 was "unlawfully extracted from Mr. Bussoz under duress."

(e) WHOLLY UNFOUNDED AND ERRONEOUS STATEMENTS AS TO THE CONDUCT AND ACTIONS OF THE DISTRICT JUDGE.

In many ways the most disturbing statement in the Court of Appeals' Opinion is the wholly unfounded one on page 4 as follows [R. 135]:

> "For some unclear reason, the District Court failed to take into account appellant's exhibits admitted on November 10, 1952."

There is absolutely nothing in the record to support this supposition on the part of the Court of Appeals. The District Judge had indicated the nature of his ruling in his memorandum opinion filed September 29, 1952. It is difficult to believe that when counsel for the government offered the exhibits 24 days later on October 23, 1952 he did not indicate the possible significance he felt they had. They were in the District Court's possession for the next 18 days. The District Judge *admitted them into evidence* on November 10, 1952. It surely must be assumed that in doing so he was indicating his opinion that they were *relevant*. If he decided they had some relevance he must

have been aware of their contents. It is of interest to note that they were admitted into evidence in open court with both parties represented by counsel [R. 17]. This was after the judge had indicated how he was going to rule but before he signed the findings, conclusions and judgment. *It is preposterous to assume that he did not consider the Exhibits.* It is moreover a clear departure from the well established principle of law that every inference will be indulged to support the findings of the trial judge.

One cannot but suspect that the statement of the Court of Appeals at page 3 of its Opinion:

> "No reference was made in the findings to the exhibits which the Court had admitted on November 10, 1952," [R. 134].

has some relationship to this assumption by the Court of Appeals. It certainly has no other significance. The recitation of evidence or the reference to Exhibits has no necessary place in findings of fact and conclusions of law. The fact that the Findings and Conclusions which petitioner's then counsel had prepared contained surplusage of this kind does not require the addition of more merely because the court admitted into evidence certain relevant but non-persuasive documents.

The exhibits referred to simply show that instead of the Director of Selective Service applying the applicable Regulation in determining the status of various countries including France he turned to the Secretary of State *but never advised the Secretary of State as to what standards were controlling under the regulations!*

We have no way of knowing, and the District Judge had no way of knowing, what standard the Secretary of

State applied or what standard the Director of Selective Service applied. We do know that neither of them followed the standard set forth in the Regulations.

Nothing in any of the exhibits could properly have changed the District Judge's mind. None of the exhibits in any way indicated that France had ever ceased to be "at war with" Germany, or that Germany was not then "a country against which the United States [had] declared war."

Over and above the failure to read the record, the refusal of the Court of Appeals to either grant a rehearing or even to modify its opinion in light of all these errors which were forcefully called to the Court of Appeals' attention in petitioner's petition for rehearing is a drastic and shocking departure from the accepted and usual course of judicial proceeding.

Respectfully submitted,

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Local Board Release No. 112 4

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 93

RENE BUSSOZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 132–137) is reported at 218 F. 2d 683. The opinion of the district court appears at pages 8–16 of the record.

JURISDICTION

The judgment of the court of appeals was rendered on January 15, 1955 (R. 138), and a petition for rehearing was denied on March 9, 1955 (R. 139). The petition for a writ of certiorari was filed on May 23, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the government's appeal to the court of appeals within 60 days of the order admitting petitioner to citizenship but more than 60 days from the order declaring him eligible for citizenship was timely.

2. Whether the determination by the National Director of Selective Service that France was a neutral state for the purposes of exemption from military service under section 3 (a) of the Selective Service Act of 1940 was subject to judicial review in a naturalization proceeding.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885 (50 U. S. C. App. [1946 ed.] 301) and the regulations issued thereunder, Title 32, Code of Federal Regulations (Cum. Supp.) are as follows:

> Section 3 (a) (50 U. S. C. App. [1946 ed.] 303 (a)).
>
> SEC. 3 (a). Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States, *Provided,* That any citizen or subject of a neutral country shall be relieved from

liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: * * *.

Section 10 (50 U. S. C. App. [1946 ed.] 310):

(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act; * * *

(3) to appoint, by and with the advice and consent of the Senate, * * *, a Director of Selective Service who shall be directly responsible to him * * * to carry out the provisions of this Act;

* * * * *

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act * * *.

Regulation 603.1, 32 C. F. R., Cum. Supp., p. 9095:

Director of Selective Service. The Director of Selective Service is responsible directly to the President. He is hereby charged with the administration of the selective service law and is hereby authorized and directed:

(a) To prescribe such amendments to the regulations in this part as he shall deem necessary.

(b) To issue such public notices, orders, and instructions as shall be necessary to the efficient administration of the selective service law.

* * * * *

(e) To perform such other duties as shall be required of him under the selective service law.

* * * * *

Regulations 601.1, p. 9092:

Definitions to govern. The definitions contained in this part shall govern in the interpretation of the Selective Service Regulations.

Regulations 601.2, p. 9092:

Aliens. (a) The term "alien" means any person who is not a national of the United States.

* * * * *

(c) The term "citizen or subject of a neutral country" is used to designate an alien who is a citizen or subject of a country which is neither a cobelligerent country nor an enemy country. * * *

Local Board Release No. 112 which was in effect from September 30, 1942, to June 3, 1943, provided in pertinent part:

Neutral alien relief from military service.—Alien registrants who are citizens or subjects of a neutral country may file Application by Alien for Relief from Military

> Service (Form 301), as provided by section 622.43 (b), Selective Service Regulations. To assist local boards in determining whether or not an alien registrant is a citizen or subject of a neutral country, there is attached to this release a list of all countries divided into three groups: (1) enemy countries, (2) cobelligerent countries, and (3) neutral countries. When a change occurs in the status of any of these countries, the attached list will be amended.

On the attached list under neutral countries, the following appears:

> France and Possessions except those [listed as cobelligerents].

STATEMENT

Petitioner, a native and national of France who has resided in this country since his admission for permanent residence in 1939, filed his first declaration of intention to become a United States citizen in 1940 (R. 3, 40, 41, 111). In 1952, he filed a petition for naturalization in the United States District Court for the Southern District of California (R. 3–4).

The Immigration and Naturalization Service objected to the granting of the petition on the ground that petitioner was ineligible for citizenship, having incurred such disability under section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra*, pp. 2–3), by applying for and being granted exemption from military

service in the armed forces of the United States as a neutral alien (R. 5).[1]

It was shown at the hearings that, after petitioner registered under the Selective Training and Service Act in 1943 when he was 37 years of age (R. 43), he received a Selective Service questionnaire (R. 45) containing the standard question addressed to aliens, whether he objected to service in the United States armed forces (Ex. B, R. 107–117, 113). The questionnaire stated that, if he objected to such service and was a national of a neutral country he could apply for relief therefrom by executing Form DDS 301; that after the execution and filing of such Form, he would be relieved from service, but that he would also be debarred from thereafter becoming a citizen of the United States (Ex. B, R. 107–117, 113). Thereafter in reply to a letter, petitioner was advised that citizens of France and its possessions, except those fighting under French authority, were neutral and that by executing Selective Service Form DDS 301, he would be relieved from military service, if such was his intention (Gov. Ex. A.).[2]

[1] The government also objected on the ground that petitioner had "failed to establish good moral character during the period required by law" (R. 5). The trial court's finding in petitioner's favor on this issue (R. 21) was not challenged by the government on appeal (see R. 25).

[2] Exhibits designated Gov. Exhibits A, B, and D through K and petitioner's exhibits 1 through 7 are not part of the printed record on appeal, but were filed in the Court of Appeals and are filed with this Court.

Petitioner sought advice from one of the local draft board advisers, attorney Samuel J. Crawford (R. 29, 32, 45), expressing fear of reprisal to members of his family who were still living in France and fear that if captured in an American uniform he would be shot as a guerilla rather than treated as a prisoner of war, and yet not desiring to lose his right to citizenship. Mr. Crawford told petitioner that if he presented the case as it was, he "certainly would be in position some day to fight" it (R. 47).[3] Accordingly in April 1943, pursuant to Mr. Crawford's advice, petitioner filed his questionnaire wherein he indicated that he objected to military service, executed and filed Form DDS 301 applying for relief from such service, and surrendered his copy of his declaration of intention to become a citizen. He attached to the questionnaire an affidavit which Mr. Crawford had drafted (Ex. B, R. 107–117, 107–109, 113; Ex. C, R. 117–120; R. 30, 47–48) in which he outlined his reasons for objecting to service, as set forth above, and said that, except for such considerations, he would have been glad to serve (Ex. C, R. 117–120). In addition he said (Ex. C, R. 118–119):

* * * * *

> The undersigned within six months and two days from the date of his arrival in the

[3] Mr. Crawford advised petitioner to go into farming and be deferred as a farmer. However the local draft board denied petitioner a 90-day deferment to enable him to buy a farm. (R. 45–46.)

> United States had made application, and received his first citizenship papers, and it was his intention and hope and desire to become a citizen of the United States; that the undersigned appreciates that his answer to question 41 may possibly jeopardize that desire, but under the circumstances hereinafter related it is hoped that some solution can be worked out that will help the undersigned; * * *.

On April 12, 1943, petitioner was classified as IV–C (an alien relieved from military service). About a year later he was classified IV–C (H) (an alien and over-age for military service) and then in October 1944 IV–A (over-age for military service) (Gov. Ex. B).

Upon France's liberation in November 1944, petitioner, pursuant to Mr. Crawford's advice, wrote to his local draft board that, in view of the changed situation in France, the reasons for his claiming relief from United States military service no longer existed and he was now willing to serve (Ex. E, R. 120–121; R. 33–34, 49). The board took no action with respect to this letter (R. 50; see also Gov. Ex. B).

At the naturalization hearings, petitioner testified that when he deliberated about claiming the exemption, he was aware that if he "were a neutral" he would be barred forever from citizenship, but he "hoped that some day the nature of the status of France would come to light" and he would get his citizenship "anyway" (R. 46).

When the court indicated that it considered petitioner's claim to have been consciously and deliberately made (R. 66, 72), petitioner's counsel agreed that "the only real issue before the court" was whether or not France was a neutral country (R. 63, 72). To this end, he introduced in evidence a letter from the State Department dated August 7, 1946, and signed by the Chief of the Public View and Inquiries Section, Division of Public Liaison, in which it was stated that "During World War II France's status was never that of a neutral country." (Petitioner's Exhibit 4; R. 51–53). Also introduced for that purpose were a letter from the French Consul General at Los Angeles, California, and excerpts from the 1943 World Almanac (Petitioner's Exhibits 1, 6, and 7). The government took the position that the determination by the Director of Selective Service was conclusive (R. 91). It did not as requested by the court (R. 92–93) submit by September 1, 1952, evidence on the status of France during 1943 (R. 92–93).

On September 29, 1952, the court filed an opinion expressing the view "that when petitioner signed Form 301, France was not a neutral country, and, as a consequence, the statute did not apply as to him" (R. 13–16).

Thereafter the government submitted Exhibits D through K which showed that in September 1942 the Director of Selective Service, with the cooperation, approval and advice of the Secretary

of State (Legal Advisor's office), determined that "France and Possessions except those listed as cobelligerent" were neutral and that local boards were so advised in local board release No. 112.[4] The district court admitted the documents in evidence on November 10 when the court entered findings of fact and conclusions of law in accord with its prior opinion (R. 17–21). On that same day, November 10, 1952, the district court entered a judgment decreeing that petitioner be naturalized and ordering that he appear on December 12, 1952, to take the oath (R. 21–22). On December 12 an order was entered admitting petitioner to citizenship (R. 23). The government noted an appeal from the latter order on February 10, 1953 (R. 24). On appeal the order of the district court was reversed (R. 138), the court of appeals holding that the district court had no power to make its own determination of the status of France for the purposes of determining the effect of the claim to exemption (R. 132–137).

ARGUMENT

1. For the first time petitioner contends (Pet. 15–16) in this Court that the government's appeal to the court of appeals, having been taken more than 60 days from the order of November 10, 1952, declaring him eligible to citizenship, was untimely even though it was within 60 days of

[4] This determination was in effect when petitioner signed Form DDS 301 in April 1943.

the order of December 12, 1952, actually admitting him to citizenship. He argues that the order of November 10, 1952, was a final order from which an appeal could have been taken and that therefore the order of December 12 was not a final decision within the meaning of 28 U. S. C. 1291. However, whether or not petitioner is correct in his premise, his conclusion that the second order was not appealable does not follow. It is clear that the later order admitting petitioner to citizenship was the concluding action of the district court disposing of the matter. Until that was done petitioner remained an alien. The order constituted a final judicial determination that he had met all the requirements for citizenship including the taking of the oath itself. In its nature it fulfills the requirements of 28 U. S. C. 1291 for a final order.

Although the issue was not there involved, the language of this Court in *Bindczyck* v. *Finucane,* 342 U. S. 76, 84, 86–87, seems to assume that the order actually admitting the alien to citizenship is the proper subject for appeal. And in the statute dealing with denaturalization (8 U. S. C. (1946 ed.) 738) Congress speaks of proceedings for the purpose of revoking "the order admitting such person to citizenship."

The situation is entirely different from such cases as *Dickenson* v. *Petroleum Corporation,* 338 U. S. 507, where the appealability of a first order finally disposing of the petitioner's interest in the

litigation was held to preclude his right to appeal from a subsequent order. Here, it is clear that the order admitting the petitioner to citizenship finally determined the issues between the parties involved in the appeal.

Insofar as the second order reaffirmed the first as to the issue of petitioner's qualifications for citizenship, it would seem reasonable to consider it as having the same effect in calculating the time for appeal as the denial of a rehearing. See *National Brake & Electric Co.* v. *Christensen,* 258 Fed. 880, 882 (C. A. 7). Cf. *Union Guardian Trust Co.* v. *Jastromb,* 47 F. 2d 689 (C. A. 6).

With respect to naturalization proceedings there is no direct authority on the issue here raised. However, the great bulk of cases dealing with the words "final decisions" in the appeal section of the Judicial Code (28 U. S. C. 1291)—discouraging piecemeal appeals and supporting the view that an appeal may be taken from the last judicial act in a case—support the jurisdiction of the court below in this case.

2. Petitioner attacks the holding of the court below that the district court had no authority to substitute its judgment for that of the Director of Selective Service as to the status of France as a neutral state during 1943 for the purposes of Section 3 (a) of the Selective Service Act of 1940. The decision, however, is in accord with the well-established principle that the courts will not interfere with decisions which concern the conduct of

foreign relations; that in such a field the decisions of the political branch must be paramount. *E. g., United States* v. *Curtiss-Wright Corporation,* 299 U. S. 304; *United States* v. *Belmont,* 301 U. S. 324, 330; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297, 302; *Jones* v. *United States,* 137 U. S. 202, 212. In such matters as recognition of neutrality or belligerency, the courts merely take judicial notice of the action of the Executive, which is binding on them. *Oetjen* v. *Central Leather Co.; United States* v. *Belmont, supra; United States* v. *Palmer,* 3 Wheat. 610, 634–635; *The Divina Pastora,* 4 Wheat. 52, 63–64.

For the purpose of carrying out the provisions of the Selective Service Training and Service Act of 1940, the President, under the authority of Section 10, *supra,* p. 3, delegated to the Director of Selective Service all the authority (except the power to conscript industry) vested in him under the Act, including the making of rules and regulations for determining the status of registrants seeking exemption under Section 3 (a). Necessarily included in this delegation was the Executive authority to determine the war status of the foreign nationals who were under a duty to register under the Act. Cf. *Dingman* v. *United States,* 156 F. 2d 148 (C. A. 9), certiorari denied, 329 U. S. 730; *Roodenko* v. *United States,* 147 F. 2d 752 (C. A. 10), certiorari denied, 324 U. S. 860. The determination by the Director of Selective Service that France was neutral in 1943 was thus a political act of the Executive binding on the courts. Cf. *Ludecke* v. *Watkins,* 335 U. S.

160, 165–166; *Kennett* v. *Chambers,* 14 How. 38, 50–51; *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377, 380–381. Particularly is this so since the determination was made with the advice and cooperation of the Department of State through which the President customarily acts in his role as constitutional representative in foreign affairs.

Petitioner argues (Pet. 14–15) that the determination of neutrality was no less subject to judicial review than the question of residence which was reviewed and determined by this Court in *McGrath* v. *Kristensen,* 340 U. S. 162. This ignores the distinction between political determinations and ordinary findings of fact. Petitioner points to the statement in that opinion (at p. 172) that since the Court concluded that Kristensen was not a resident, it was unnecessary to consider whether Denmark was a neutral country. But since the Court found it unnecessary to consider the question at all, it had no occasion to consider whether the determination by the Director of Selective Service would have been binding upon it. The statement in the *Kristensen* opinion cannot be deemed to have overruled the settled principles established by the cases cited above.

Even if the determination of neutrality were reviewable, the court below was correct in holding that there was no basis for overruling the determination by the Director. The concept of neutrality for the purposes of the Selective Service law is not necessarily the same as for other purposes and in other contexts. The regulation

by the Director of Selective Service that aliens who have resided in this country more than three months shall be deemed resident aliens unless they apply for determination of status has been upheld as applied to an alien admitted as a business visitor against the claim that in many other aspects he is not deemed a resident. *Mannerfrid* v. *United States,* 200 F. 2d 730 (C. A. 2), certiorari denied, 345 U. S. 918. Similarly, this determination by the Director of Selective Service for the purposes of the law administered by him must be judged in the particular context in which it is applied.

Petitioner argues (Pet. 26) that, in ruling that France was neutral in 1943, the Director violated his own regulations, 32 C. F. R. 601.2 (d), which defined a co-belligerent as "any country at war with a country against which the United States has declared war." But it was precisely because France in 1942 and 1943 was not actually at war that it became necessary to make a determination as to its status for the purposes of the Selective Service Act. Considering the peculiar situation of France in those years, the determination that it was neutral for the purposes of Selective Service was not unreasonable and should not be disregarded by the courts.

The question has no future significance. As to all naturalizations after the effective date of the Immigration and Nationality Act of 1952, December 24, 1952, Section 315 of that Act (66 Stat. 242, 8 U. S. C. 1426) provides:

> (a) Notwithstanding the provisions of section 405 (b) [the savings clause as to pending applications], any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.
>
> (b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Thus the mere fact that exemption was sought and obtained as an alien is now conclusive on the issue of eligibility for naturalization, where such exemption was, as in this case, knowingly sought and obtained.[8] Cf. *Shomberg* v. *United States*, 348 U. S. 540.

[8] From petitioner's testimony at the hearings and from the exhibits which he filed with the local board, it is clear that when petitioner executed Form DDS 301, he knew the consequences that would flow from such execution, but, as he testified, he hoped that he would get his citizenship "anyway" because of extenuating circumstances (R. 46). This hope was his own; no responsible official, as in *Moser* v. *United States*, 341 U. S. 41, gave him any assurance that the consequence of debarment could be avoided. The advice which he received from this local board advisor was merely that at some future date he might explain to a naturalization court the circumstances under which he

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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sought the exemption. Section 3 (a) is clear and unequivocal and no exception is made for extenuating circumstances. *Petition of Fatoullah*, 76 F. Supp. 499 (E. D. N. Y.). Petitioner knowingly took a calculated risk.

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